Supreme Court, U.S.
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No. 96-906

In The

Supreme Court of the United States

October Term, 1996

JANETTE M. LOHMAN, *et al.*,

Petitioners,

vs.

EVELYN SUSAN HAFLEY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

In accordance with the requirement of United States Supreme Court Rule 15.2, objection is made to the initial paragraph of the Question Presented By Petitioners as it is not a question presented, but, rather, conclusory and unsupported narrative.

Further objection is made to the second paragraph of the Question Presented By Petitioners in that it improperly attempts to bring before this Court matter which the United States Court of Appeals for Eighth Circuit properly found that it lacked jurisdiction to review on interlocutory appeal, specifically, factual issues related to the sufficiency of the pleadings which were found factually sufficient by the United States District Court for the Western District of Missouri, Central Division.

LIST OF PARTIES

Petitioners are Janette Lohman, Director, Department of Revenue; James Callis, Deputy Director; Dean Powell, formerly, Assistant Administrator, Field Services Bureau; Rich Lamb, Administrator, Field Services Bureau; Raymond Hume, Director, Division of Motor Vehicles; William Siedhoff, formerly, Director, Division of Motor Vehicle and Driver's Licensing; Mary Ann Reuter, formerly, Field Services Bureau, Manager; Lynn Bexten, Personnel Officer; Zoe Lyle, formerly, Deputy Division Director, Motor Vehicle and Driver's Licensing; Ellie James, formerly, Administrator, Field Services Bureau; and, William H. Melcher, formerly, Deputy Director and Acting Director. Respondent is Evelyn Susan Hafley, currently an untitled employee of the Department of Revenue; formerly, and at all times relevant and material, Administrative Coordinator of its Field Services Bureau.

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APPENDIX

Appendix A — Rule 12(b)(6) of the Federal Rules of Civil Procedure 1a

Respondent, Evelyn Susan Hafley, respectfully requests that the Court deny the Petition for a Writ of Certiorari requested herein.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 90 F.3d 264, and is reproduced in Petitioners' Appendix (hereinafter, "Pet. App.") at pages A-2 through A-8. The order of the Court of Appeals for the Eighth Circuit denying the Petition for Rehearing and Suggestions for Rehearing En Banc was filed on September 3, 1996, and is reproduced in Pet. App. A-1. The order is unpublished. The order of the United States District Court for the Western District of Missouri, Central Division denying Petitioners' [defendants'] Motion to Dismiss was filed on August 7, 1995, and is reproduced at Pet. App. A-10. The order is unpublished. The order of the United States District Court for the Western District of Missouri, Central Division denying Petitioners' [defendants'] Motion to Reconsider was filed on September 7, 1995, and is reproduced at Pet. App. A-9. The order is unpublished.

STATEMENT OF JURISDICTION

As the United States Court of Appeals for the Eighth Circuit lacked jurisdiction on interlocutory appeal to review the factual issues related to the sufficiency of the pleadings decided by the United States District Court for the Western District of Missouri, Central Division, it is respectfully submitted that this Court lacks jurisdiction to consider those factual issues. Although not expressly set forth in the Question Presented By Petitioners, to the extent Petitioners may be implicitly seeking review with respect to the purely legal issue of whether the legal norms allegedly violated were clearly established law at the time, this Court, should it choose to do so, has jurisdiction to review the

order, dated September 3, 1996, of the United States Court of Appeals for the Eighth Circuit denying Petitioners' Petition for Rehearing and Suggestion for Rehearing En Banc by a Writ of Certiorari pursuant to 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(c).

The United States Court of Appeals for the Eighth Circuit had jurisdiction over the legal issue of whether Petitioners [defendants] were entitled to qualified immunity on the appeal from the order, dated September 7, 1995, of the United States District Court for the Western District of Missouri, Central Division denying Petitioners' Motion to Reconsider [the Motion to Dismiss of Petitioners/defendants] pursuant to 28 U.S.C. § 1291. The United States District Court for the Western District of Missouri, Central Division had jurisdiction of Respondent's [plaintiff's] claims of violation of her rights under the First Amendment to the Constitution of the United States pursuant to 28 U.S.C. §§ 1331 and 1343(4) and 42 U.S.C. § 1983.

CONSTITUTIONAL, STATUTORY PROVISIONS AND RULES INVOLVED

Parts of the First Amendment to the Constitution of the United States, 42 U.S.C. § 1983, and Mo. Rev. Stat. § 32.057.1 (1994), which are set forth in Pet. App. A-20, A-21 and A-22 respectively; and, Rule 12(b)(6) of the Federal Rules of Civil Procedure which is set forth in Respondent's Appendix A hereto (hereinafter "Resp. App.").

STATEMENT OF THE CASE

Respondent respectfully opposes the Petition for Writ of Certiorari which, in the main, assails the opinion of the United States Court of Appeals for the Eighth Circuit in this case with unsupported conclusions and hypotheticals, and fails to

demonstrate any compelling reason for the granting of a writ in this case.

A. Course of Proceedings and Disposition of the Case Below

Respondent, Evelyn Susan Hafley (hereinafter, "Mrs. Hafley), an Administrative Coordinator of eighteen (18) years tenure with the Missouri Department of Revenue, filed her complaint in this matter in the United States District Court for the Western District of Missouri, Central Division. The complaint is reproduced at Pet. App. A-11 through A-19. As indicated in the opinion of the United States Court of Appeals for the Eighth Circuit, Mrs. Hafley's claims arose as a result of retaliation against her, "for speaking to her supervisors about a matter of public concern, specifically an attempt to hide government records from an impending criminal investigation of the handling of public funds by the Missouri Department of Revenue at its University City Fee Office." Pet. App. at A-6.

On or about March 2, 1993, Mrs. Hafley was instructed by Petitioner, Ellie James, to hide a file containing information respecting the Missouri Department of Revenue's University City Fee Office, and further instructed to say nothing about it. Mrs. Hafley advised Ms. James that she would do neither act as such acts, if committed, would be illegal as the file and its contents were the subject of an impending criminal investigation. Shortly thereafter, in March of 1993, the file was seized by members of a criminal investigative team.

Subsequent to refusing Ms. James' instructions to commit illegal acts, Mrs. Hafley reported Ms. James' instructions to Ms. James' superior, Petitioner, Dean Powell. However, Mr. Powell, rather than responding to Mrs. Hafley's reporting of such illegal conduct, instead told her to do as Ms. James had told her to do, and stay out of it. Following her meeting with Mr. Powell, Mrs.

Hafley once again reported the actions and inactions of Ms. James and Mr. Powell to Mr. Powell's superiors, Petitioners Rich Lamb and Mary Ann Reuter, who took no remedial action.

Ms. James' employment with the Missouri Department of Revenue was terminated in or about June of 1993. However, beginning in March of 1993, immediately following Mrs. Hafley's speech detailed above, each of the Petitioners instituted various actions against Mrs. Hafley to which she had never before been subjected to in her long tenure as an employee of the Missouri Department of Revenue. Mrs. Hafley pled and contends that those actions were taken against her in retaliation for her exercise of First Amendment rights secured to her by the Constitution of the United States.

As noted in the opinion of the United States Court of Appeals for the Eighth Circuit, none of the Petitioners filed an answer to the complaint, "[I]nstead, the defendants [Petitioners] moved to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6)." Pet. App. at A-4. The United States District Court for the Western Division of Missouri, Central Division denied Petitioners' motion to dismiss on the basis of qualified immunity and also denied a subsequent motion to reconsider. Pet. App. at A-9 and A-10. The United States Court of Appeals for the Eighth Circuit, conducting de novo review, affirmed the District Court's denial of Petitioners' motions to dismiss and to reconsider, and subsequently denied Petitioners' petition for rehearing and suggestion for rehearing en banc. Pet. App. at A-1 through A-8.

B. Correction of Misstatements in the Petition

The opinion of the United States Court of Appeals for the Eighth Circuit correctly sets forth the facts of this case. The opinion accurately describes the gravity of the retaliatory acts

directed toward Mrs. Hafley and her interest in commenting upon matters of public concern. In the interest of making this brief truly brief, Respondent respectfully directs the Court's attention to the opinion of the United States Court of Appeals for the Eighth Circuit. Pet. App. at A-2 through A-8.

However, in accordance with the requirements of United States Supreme Court Rule 15.2, Respondent objects to, and brings the following misstatements of facts contained in the petition to, the Court's attention.

Objection is respectfully made to Petitioners' attempted characterization of Mrs. Hafley as a, "clerical employee" (Petition at 3). Mrs. Hafley was, at all times relevant and material, Administrative Coordinator, Field Services Bureau, Missouri Department of Revenue.

Ojection is respectfully made to Petitioners' attempted characterization of Mrs. Hafley's actions as a refusal to perform legitimately assigned work by their reference to the Revised Statutes of Missouri, § 32.057.1 (1994) (Petitition at 20). Mrs. Hafley refused to hide a file which was the subject of an impending criminal investigation.

Objection is respectfully made to Petitioners' attempted characterization that Mrs. Hafley made no substantive allegations as to multiple Petitioners (Petition at 3). As was noted by the United States Court of Appeals for the Eighth Circuit, Mrs. Hafley alleged in her complaint that, ". . . the defendants [each Petitioner] thereafter retaliated against her in a variety of ways for her attempts to report the actions of James and Powell and for her refusal to hide the file, which later allegedly was seized in a criminal investigation of the University City fee office. She alleges that the defendants [Petitioners] took these actions 'to punish Plaintiff [Respondent] for refusing

to commit an illegal act and exercising her First Amendment rights', specifically the 'right to exercise freedom of speech.' " Pet. App. A-4.

REASONS FOR DENYING THE WRIT

United States Supreme Court Rule 10 provides in pertinent part that, "[R]eview on a writ of certiorari is not a matter of right, but of judicial discretion. A Petition for a Writ of Certiorari will be granted only for compelling reasons." In the Petition for Writ of Certiorari, Petitioners have completely failed to demonstrate how this Court's review will impact anyone other than the immediate parties to this litigation.

As discussed in more detail below, Petitioners erroneously conclude that there are "conflicts and inconsistency" among the federal circuits with respect to factual sufficiency of pleadings. Further, that factual matter was not properly before the United States Court of Appeals for the Eighth Circuit, and is not properly before this Court. *Johnson v. Jones*, __ U.S. __, 115 S. Ct. 2151 (1995); *Mitchell v. Forsyth*, 472 U.S. 511 (1985). Petitioners do not, and cannot, demonstrate that the decision of the United States Court of Appeals for the Eighth Circuit deviates, in any way, from the recent mandate respecting the single, legal issue that is appealable from a District Court as set forth by this Court in *Johnson v. Jones*, 115 S. Ct. at 2158 (refusing to extend interlocutory appeals in qualified immunity cases to matters of factual sufficiency). Thus, Petitioners proferred "conflicts and inconsistency" argument is irrelevant and misplaced as to this case in its present posture as well as erroneous.

In essence, Petitioners' argument reduces to their dissatisfaction with the the result of the qualified immunity analysis conducted by the United States Court of Appeals for the Eighth Circuit as they concede that the United States Court

of Appeals for the Eighth Circuit did conduct de novo review in concluding that Mrs. Hafley had stated a claim of violation of clearly established law. However, this Court does not sit for the benefit of particular litigants. *See, Rice v. Sioux City Cemetery*, 349 U.S. 70, 74-75 (1955); nor is jurisdiction in this Court properly exercisable merely to give the defeated party in the circuit court of appeals another hearing. *See, Magnum Import Co. v. Coty*, 262 U.S. 159 (1923).

In sum, there is nothing special or compelling about the decision of the United States Court of Appeals for the Eighth Circuit that would justify the consideration of this Court. Whether the Petitioners are dissatisfied with the result of the analysis conducted by the United States Court of Appeals for the Eighth Circuit (hereinafter, "Court of Appeals") and with the factual sufficiency ruling of the United States District Court for the Western District of Missouri, Central Division (hereinafter, "District Court") is legally inconsequential. Of consequence, and mandating denial of the requested Writ of Certiorari, is the fact that the Court of Appeals applied the correct legal standard in conducting its analysis.

As noted above, the District Court twice reviewed the factual sufficiency of Mrs. Hafley's complaint on Petitioners' motion to dismiss on the grounds of qualified immunity pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and motion to reconsider. Thereafter, rather than file an answer, Petitioners appealed.

On appeal, Petitioners challenged, *inter alia*, the factual sufficiency of Mrs. Hafley's complaint contending that it did not meet the Court of Appeals heightened pleading requirement as set forth in *Edgington v. Missouri Dep't of Corrections*, 52 F.3d 777, 779 (8th Cir. 1995), and further contending that the complaint failed to set forth specific acts committed by seven

(7) of the eleven (11) Petitioners. The Court of Appeals correctly found that it lacked jurisdiction to consider Petitioners' challenge to the factual sufficiency of Mrs. Hafley's allegations.

Although Petitioners attempt to invoke review by this Court by asserting that "conflicts and inconsistency" exist as a result of the Court of Appeal's decision, they fail to appreciate that there is absolutely no conflict between the decision of the Court of Appeals and this Court's mandate on interlocutory appellate jursidiction set forth in *Johnson v. Jones*, *supra*. The only *post circa* 1995 case cited by Petitioners on this point, *Veney v. Hogan*, 70 F.3d 917 (6th Cir. 1996), does not support their proposed expansion of appellate review on interlocutory appeal. However, assuming *arguendo* the existence of conflicts and/or inconsistency between the Sixth Circuit and this Court's decision in *Johnson v. Jones*, *supra* it is respectfully submitted that review by this Court would be appropriately directed to *Veney*'s progeny in the Sixth Circuit. Further, it is respectfully noted that the other two cases cited by Petitioners on this point, *Olandeinde v. City of Birmingham*, 963 F.2d 1481 (11th Cir. 1992) and *Whitacre v. Davey*, 890 F.2d 1168 (D.C. Cir. 1989), were decided without the benefit of this Court's guidance in *Johnson v. Jones, supra.*

It is well established that public officials are entitled to qualified immunity when their conduct does not violate clearly established law. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In determining the entitlement, the threshold immunity question centers on an objective standard "as measured by reference to clearly established law." *Id.* at 818. A district court's denial of an entitlement to qualified immunity is properly the subject of an interlocutory appeal. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

However, contrary to Petitioners' assertions herein, the

appellate court is not required to review the district court's ruling on the factual sufficiency of the pleadings. *Mitchell v. Forsyth*, 472 U.S. at 528 ("An appellate court reviewing the denial of a defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim. All it need determine is a question of law: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions . . .").

The appealable issue is a purely legal issue; it is not, as Petitioners contend, a factual one. *Id.* at 528 n. 9. Thus, the Court of Appeals declination of jurisdiction as to Petitioners' factual sufficiency claims was completely proper. Indeed, as this Court reiterated in its last term, such declination of jurisdiction was requisite. *Johnson v. Jones*, __ U.S. __, 115 S. Ct. at 2156. In *Johnson* this Court discussed in detail *Mitchell, supra* in holding that a district court's denial of a motion for summary judgment on the grounds of qualified immunity, being factual in nature, was not appealable:

> We now consider the appealability of a portion of a district court's summary judgment order that, though entered in a "qualified immunity" case, determines only a question of "evidence sufficiency," *i.e.*, which facts a party may, or may not, be able to prove at trial. This kind of order, we conclude, is not appealable. *Id.* at 2156.

Petitioners also fail to address the draconian impact that their proposed level of appellate review on interlocutory appeal would have on the dockets of the circuit courts of appeals and district courts throughout the United States as well as this Court. Petitioners' proffered fact based level of scrutiny would permit

any defendant (and, for that matter, any plaintiff opting not to file an amended complaint) disappointed by a district court's ruling on the factual sufficiency of pleadings to immediately seek interlocutory appellate review. Carried to its logical consequence, Petitioners' suggested level of scrutiny would also permit any party disappointed by the decision of a court of appeals to thereafter petition this Court for a Writ of Certiorari.

Petitioners' position on this point is characterizable as a "two or three bite at the apple rule" which would effectively open "appellate floodgates" and totally eliminate the role of the district courts of the United States in considering and ruling on motions to dismiss as well as motions for summary judgment in favor of plaintiffs. However, Petitioners' position is not novel; it is precisely the abandonment of separability and "small step beyond *Mitchell*" which this Court rejected during its last term. *Johnson v. Jones, supra* at 2157 ("[T]o take what petitioners call a small step beyond *Mitchell,* Brief for Petitioners 18, would more than relax the separability requirement — it would in many cases simply abandon it.")

Petitioners, as noted above, may also be implicitly raising the issue that Mrs. Hafley has not claimed a violation of clearly established law at the time of the challenged action. It is respectfully submitted that Petitioners' argument on this point is, as was found by the Court of Appeals, specious. Pet. App. at A-7. The Court of Appeals conducted the proper analysis and balancing test; again, Petitioners' dissatisfaction with the results thereof is not a reason for the granting of their requested Writ of Certiorari.

As noted by the Court of Appeals, Mrs. Hafley, herself a public official, alleged retaliation against her, "for speaking to her supervisors about a matter of public concern, specifically

an attempt to hide government records from an impending criminal investigation of the handling of public funds by the Missouri Department of Revenue at its University City fee office". Pet. App at A-6. The Court of Appeals conducted the proper legal analysis reasoning that speech regarding the use of public funds touches upon a matter of public concern. *Kincade v. City of Blue Springs*, 64 F.3d 389, 396 (8th Cir. 1995), *cert. denied*, __ U.S. __, 116 S. Ct. 1565 (1996). The Court of Appeals further correctly concluded that statements by public officials, such as Mrs. Hafley, on matters of public concern are entitled to First Amendment protection, and that it was clearly established at the time of her speech that retaliation against her could have violated the First Amendment under *Connick v. Myers*, 461 U.S. 138, 146 (1983) and *Pickering v. Board of Educ.*, 391 U.S. 563, 574 (1968).

The Court of Appeals then conducted the appropriate balancing test as mandated by this Court. *Pickering, supra* at 568 (balancing, "the interest of the [public employee] as a citizen, in commenting on matters of public concern, and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."). Properly construing the allegations and all reasonable inferences therefrom in favor of Mrs. Hafley, the Court of Appeals reasoned that her interest in exposing an attempt to obstruct a criminal investigation into the handling of public funds outweighed the state's interest, noting that, "[T]he *Pickering* balance understandably favors the plaintiff when the test is based solely on the allegations in the complaint." Pet. App. at A-7–A-8.

CONCLUSION

This case is not one appropriate for review by this Court. It proposes an untenable standard of appellate review on interlocutory appeals that was expressly rejected by this Court during its last term, and, as such, does not present a contemporary issue of special importance. Further, the United States Court of Appeals for the Eighth Circuit correctly applied the law. Therefore, and for the foregoing, the Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A — RULE 12(b)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE

RULE 12

DEFENSES AND OBJECTIONS — HOW PRESENTED — BY PLEADING OR MOTION — MOTION FOR JUDGMENT ON THE PLEADINGS

* * *

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if ione is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted, . . . If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

* * *